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IN THE

Supreme Court of the United States

October Term, 1951

No. 528

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BURTON K. WHEELER
EDWARD K. WHEELER
ROBERT G. SEAKS
Counsel for Missouri Pacific Railroad Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Missouri Pacific Railroad Company respectfully prays that a writ of certiorari be issued to review an order of the United States Court of Appeals for the Eighth Circuit entered in this cause on August 14, 1951, affirming an order of the United States District Court for the Eastern District of Missouri, Eastern Division, overruling all objections against and approving a Plan of Reorganization for Missouri Pacific Railroad Company, and its subsidiary railroads, certified to the District Court by the Interstate Commerce Commission pursuant to Section 77 of the Bankruptcy Act.

OPINIONS BELOW

The opinion of the Court of Appeals (C. R. 20-44) * is reported in 191 F. 2d 265. The opinion of the District Court (R. 915-944) is reported in 93 F. Supp. 832. The immediately pertinent reports of the Interstate Commerce Commission in its Finance Docket No. 9918, Missouri Pacific Railroad Company Reorganization, are reported in 275 I. C. C. 59 (D.R. 28469-28636) and 275 I.C.C. 203 (D.R. 28639-28686).

JURISDICTION

The order of the Court of Appeals was entered August 14, 1951 (C.R. 46-49). By order of this Court, dated October 30, 1951, the time for filing a petition for a writ of certiorari by this Petitioner was extended to and including January 11, 1952. The jurisdiction of this Court is invoked under Section 47 of the Bankruptcy Act (11 U.S.C. § 47) and Section 1254 of Title 28, United States Code.

QUESTIONS PRESENTED

(1) Whether a court of appeals may properly render an opinion and enter an order affirming a district court's approval of a railroad reorganization plan certified by the Interstate Commerce Commission under Section 77

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* References to the record are in the following form: C. R. refers to the printed record in a separate pamphlet entitled "Proceedings in United States Court of Appeals, Eighth Circuit"; R. refers to the printed record in Appeals Nos. 14,264-14,274 in the Court of Appeals; D. R. refers to that part of Vol. LII of the District Court Record containing the Fourth and Fifth Supplemental Reports of the Interstate Commerce Commission and its Fifth Supplemental Order; O. R. refers to the printed record before the Court of Appeals in Appeals No. 12,130-12,133, involving the Commission's 1940 plan of reorganization for the debtors.

of the Bankruptcy Act, at a time when the Commission, pursuant to Section 3 of the Act of April 9, 1948, is determining whether changes and developments require its reconsideration and possible revision of the plan, and such Act directs that "all further [judicial] proceedings for confirmation of the plan shall be suspended" pending such Commission determination.

If the answer to the foregoing question is affirmative,—

(2) Whether the Court of Appeals properly held that the Commission's conclusion as to the maximum allowable capitalization of a reorganized railroad system is "binding" upon the courts;

(3) Whether a maximum allowable capitalization for a reorganized railroad system, fixed by the Commission in 1949 on the basis of capitalizing a "normal-year earnings forecast" made in 1936, may be sustained when more than a decade of experience has established that the forecast was grossly erroneous, and included such assumptions as that the years 1930 and 1931 were years of "normal" economic activity and that gross operating revenues of the railroad would be only 40% of what they currently are; and

(4) Whether the Court of Appeals properly sustained a Commission finding that the common stock of Missouri Pacific Railroad Company is worthless when its current earnings are $26 per share.

STATUTES INVOLVED

Section 3 of the Act of April 9, 1948 (62 Stat. 167, 11 U.S.C. § 208) provides in pertinent part:

(a) Notwithstanding any other provision of law—

(1) with respect to any plan of reorganization or modified plan of reorganization approved by the

Interstate Commerce Commission under the provisions of section 205 of this title, subsequent to April 9, 1948, it shall be the duty of the Commission, upon petition of any party to the proceeding filed at any time more than eighteen months after certification by the Commission to the court of the plan or of an order disposing of a like petition, but before any order confirming the plan shall have been entered, or, such an order having been entered, if an appeal from said order is pending on said date in a United States court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such appeal or to file such petition has not expired, to report to the court in which consideration of such plan is then pending, any changes, facts, or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan in order to insure that such plan, if consummated and put into effect, shall then, in the opinion of the Commission, be fair and equitable and in the public interest and compatible with the provisions of this section and section 205 of this title. Upon the filing of any such report by the Commission with the court, the court shall remand the plan to the Commission for such reexamination, reconsideration, and possible revision;

• • • •

(5) each petition filed under the provisions of paragraph (1) or paragraph (3) of this subsection shall be filed with the court before which is pending the plan which is the subject of the petition and such petition shall be referred by the court to the Commission. Upon the filing of such petition with the court all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court.

Subsection (e) of Section 77 of the Bankruptcy Act (47 Stat. 1474, 49 Stat. 911, 49 Stat. 1969, 53 Stat. 1406; 11 U.S.C. § 205(e)) provides:

> (e) Upon the certification of a plan by the Commission to the court, the court shall give due notice to all parties in interest of the time within which such parties may file with the court their objections to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; (2) the approximate amounts to be paid by the debtor, or by any corporation or corporations acquiring the debtor's assets, for expenses and fees incident to the reorganization, have been fully disclosed so far as they can be ascertained at the date of such hearing, are reasonable, are within such maximum limits as are fixed by the Commission, and are within such maximum limits to be subject to the approval of the judge; (3) the plan provides for the payment of all costs of administration and all other allowances made or to be made by the judge, except that allowances provided for in subsection (c), paragraph (12) of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment, and the judge is hereby given power to approve the same.

If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. If the proceedings are referred back to the Commission, it shall proceed to a reconsideration of the proceedings under the provisions of subsection (d) of this section. If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: *Provided*, That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interests of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: *Provided further*, That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such

class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. For the purpose of this section the acceptance or rejection by any creditor or stockholder shall be in writing, executed by him or by his duly authorized attorney, committee, or representative. If the United States of America, or any agency thereof, or any corporation (other than the Reconstruction Finance Corporation) the majority of the stock of which is owned by the United States of America, is a creditor or stockholder, the interests or claims thereof shall be deemed to be affected by the plan, and the President of the United States, or any officer or agency he may designate, is hereby authorized to act in respect of the interests or claims of the United States or of such agency or other corporation. The expense of such submission shall be certified by the Commission and shall be borne by the debtor's estate. The Commission shall certify to the judge the results of such submission.

Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said plan; and that such acceptances have not been made or procured by any means forbidden by law: *Provided*, That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such

rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e): *Provided further,* That if, in any reorganization proceeding under this section, the United States is a creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against, the debtor, as creditor or stockholder), no plan which does not provide for the payment thereof shall be confirmed by the judge except upon the acceptance, certified to the court, of a lesser amount by the President of the United States or the officer or agency designated by him pursuant to the provisions of the preceding paragraph hereof: *Provided further,* That if the President of the United States or such officer or agency shall fail to accept or reject such lesser amount for more than ninety days after receipt of written notice so to do from the court, accompanied by a certified copy of the plan, the consent of the United States insofar as its claims for taxes or customs duties are concerned shall be conclusively presumed. If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor. If the judge shall not confirm the plan, he shall file an opinion, with a statement of his conclusions and his reasons therefor, and enter an order in which he shall either dismiss the proceedings, or, in his discretion and on the motion of any party in interest, refer the case back to the Commission for further proceedings, including the consideration of modifications of the plan or the proposal of new plans. In the event of such a reference back to the Commission, the proceedings with respect to any modified or new plan shall be governed by the provisions of this section in like manner as in an original proceeding hereunder.

If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan. The

value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts.

STATEMENT

On March 31, 1933, the Missouri Pacific Railroad Company filed a petition in the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, stating that it was unable to meet its debts as they matured and that it desired to effect a plan of reorganization pursuant to the provisions of Section 77 of the Bankruptcy Act. Similar petitions were filed in the same court by the New Orleans, Texas & Mexico Railway Company, the International-Great Northern Railroad Company, and some twenty-two other railroad corporations, a majority of whose capital stock is owned by Missouri Pacific Railroad Company either directly or indirectly through the medium of its two principal subsidiaries named above. (O.R. 299-300.)

The "Missouri Pacific System" (a collective term used throughout the proceedings to describe the Missouri Pacific Company, the New Orleans, the International and their respective debtor subsidiaries) comprises about 9,556 miles of owned railroad and 10,218 miles of operated railroad, serving the states of Missouri, Kansas, Colorado, Arkansas Louisiana, Texas, and parts of Illinois, Nebraska, and Oklahoma. (O.R. 302.) The *Missouri Pacific*, and its directly operated subsidiaries, owns about 6800 and operates about 7200 miles of railroad.

Its lines extend from St. Louis, its eastern terminus, through Kansas City to Pueblo where they connect with those of the Denver & Rio Grande Western. Other lines extend southerly from St. Louis through Memphis to New Orleans, and through Little Rock to Texarkana where they connect with the Texas & Pacific Railway Company, a subsidiary of Missouri Pacific which is not a debtor in this proceeding. The Texas & Pacific Railway Company, owning about 1800 miles of railroad, operates a main line westerly from Texarkana through Dallas and Fort Worth to El Paso. (O.R. 302-303.)

The *New Orleans* (here and hereafter used to describe the New Orleans, Texas & Mexico Railway Company and its subsidiaries other than International-Great Northern Railroad Company) owns about 1623 and operates about 1860 miles of railroad. Its lines extend from New Orleans to Brownsville, Texas, paralleling somewhat inland the Gulf seaboard, and from Corpus Christi to San Antonio where connection is made with the International-Great Northern Railroad Company. (O.R. 305-308.) The *International* (International-Great Northern Railroad Company and its subsidiaries) owns about 1100 and operates about 1155 miles of railroad. Its lines extend from a point on the Texas & Pacific Railway Company's main line near Texarkana southerly to Houston, and southwesterly through Austin and San Antonio to Laredo, and from Houston through Waco to Fort Worth where it connects with the Texas & Pacific Railway Company's main line. (O.R. 308-309.)

The petitions of the several debtor railroads were approved by the District Court as properly filed and duly referred to the Interstate Commerce Commission. The Commission, after hearing and following consideration of various proposed plans filed with it, issued a report on January 10, 1940 (239 I.C.C. 7, slightly modified on petition in 240 I.C.C. 15). The plan of reorganization for-

mulated by the Commission was approved by the District Court (*sub nomine, In re Missouri Pacific R. Co.*, 39 F. Supp. 436) and was pending on appeal before the Court of Appeals for the Eighth Circuit when this Court rendered its decisions in *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 63 Sup. Ct. 692, and *Group of Institutional Investors* v. *Chicago, Milwaukee & St. Paul R. Co.*, 318 U. S. 523, 63 Sup. Ct. 727. The case was remanded to the District Court for its reconsideration in the light of this Court's opinions in the *Western Pacific* and *St. Paul* cases. By the time (July 29, 1943) when the District Court rendered its second opinion, the Missouri Pacific System's greatly increased earnings had resulted in cash accumulations of $125,000,000. The District Court accordingly referred the plan of reorganization back to the Commisssion to consider whether adequate compensation had been allowed bondholders for loss of seniority rights and "for the further reason that changed conditions arising since the formulation of the Plan make it desirable that the Commission should have further opportunity to consider whether the Plan as formulated can be improved upon at this time." *In re Missouri Pacific R. Co.*, 50 F. Supp. 936, 943.

The Commission, after further hearings, issued a Supplemental Report on July 4, 1944. (257 I.C.C. 479, slightly modified on petition, 257 I.C.C. 745.) The Commission's second Plan of Reorganization was approved by the District Court (64 F. Supp. 64) but its order of approval was vacated and set aside without opinion by the Court of Appeals for the Eighth Circuit and the cause remanded to the District Court with directions to return the plan to the Commission for further consideration and recommendation. *Wright* v. *Group of Institutional Investors*, 163 F. 2d 1022.

The Commission, following further hearings held in 1948, issued a Fourth Supplemental Report dated Au-

gust 2, 1949, formulating a further plan of reorganization (275 I.C.C. 59, modified slightly on petition decided December 29, 1949, 275 I.C.C. 203). The Plan thus formulated was approved by the District Court in an order overruling all objections and denying all claims for equitable treatment. (*In re Missouri Pacific R. Co.*, 93 F. Supp. 832, opinion rendered July 29, 1950, as amended October 3, 1950.) The Court of Appeals held that the District Court's approval of the Plan was without error, rendering its opinion and entering its order to that effect on August 14, 1951 (191 F. 2d 265).

On July 11, 1951, or while appeals from the District Court were pending before the Court of Appeals, the Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company filed a petition requesting that the Commission report any changes, facts, or developments which had occurred since the Commission's approval of the Plan of Reorganization which had not been provided for in the Plan and which in the opinion of the Commission made it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise the Plan in order to assure that, if put into effect, it should then in the opinion of the Commission be fair and equitable and in the public interest and compatible with relevant provisions of law. Such petition was filed pursuant to the provisions of Section 3 of the Act of April 9, 1948 (62 Stat. 167, 11 U.S.C. § 208) which provides, broadly speaking, that any party to a plan of reorganization, by petition filed more than eighteen months after certification to the court by the Commission of a plan of reorganization, may require the Commission to report to the court whether there have been such changes or developments as to necessitate reexamination, reconsideration and possible revision of the plan. The petition set forth the Group's opinion that there had been no significant changes or developments since the Commission's certifica-

tion of the Plan of Reorganization on January 7, 1950, but alleged as the Group's reason for filing its petition that it would prevent possible delay by your present Petitioner in filing a petition under the Act of April 9, 1948. The Group's petition was, on July 13, 1951, referred by the District Court to the Commission.

The Act of April 9, 1948, provides in Section 3(a)(5) that, upon the filing of a petition as permitted, "all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court." Notwithstanding the filing of the Group's petition and this provision of law, the Court of Appeals subsequently on August 14, 1951, rendered its opinion and entered its order affirming the order of the District Court. Thereafter, on October 18, 1951, your present petitioner filed with the Court of Appeals its motion,* duly calling attention to the foregoing provision of law and praying that the Court's judgment of August 14, 1951, be vacated and set aside (and its supporting opinion withdrawn) as having been entered (and rendered) at a time when Section 3 of the Act of April 9, 1948, directed a suspension of proceedings. The Group filed an opposition to such motion dated October 22, 1951, to which your present Petitioner responded on October 26, 1951. The Court of Appeals has failed to act upon this motion.

Plan of Reorganization

As of January 1, 1948, the effective date of the Plan of Reorganization certified by the Commission (D.R. 28477-28480), the Commission found that there were claims against the Missouri Pacific System outstanding in the hands of the public as shown by the following table (D.R. 28474-28475):

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* Since this motion is not included within the printed record on appeal, it is reproduced as Appendix A to this Petition.

	Claims as of Jan. 1, 1948		
Missouri Pacific Company	*Principal*	*Interest*	*Total*
Equipment obligations	$16,586,567		$16,586,567
First and refunding bonds	223,190,500	$88,682,990	311,873,490
General mortgage bonds	49,339,421	29,274,723	78,614,144
Secured serial 5¼% bonds	11,245,000	8,904,634	20,149,634
Convertible 5½% bonds	45,493,000	37,948,744	83,441,744
Divisional & subsidiary company bonds	5,988,000	1,360,574	6,348,574
Preferred stock	70,190,100		70,190,100
Common stock	81,314,343		81,314,343
Total	502,346,931	166,171,665	668,518,596
New Orleans			
Equipment obligations	2,720,960		2,720,960
First mortgage bonds	40,615,900	602,620	41,218,520
Stock (held by public)	859,800		859,800
Total	44,196,660	602,620	44,799,280
International			
Equipment obligations	1,867,137		1,867,137
First mortgage bonds	28,750,000	13,685,000	42,435,000
Adjustment mortgage bonds	13,807,700	14,498,085	28,305,785
Total	44,424,837	28,183,085	72,607,922
System Total	590,968,428	194,957,370	785,925,798

The Commission found, in briefest summary, that all the debtors should be reorganized as a single system, and that the new system capitalization should not exceed about $612,000,000, inclusive of $21,000,000 of equipment obligations but exclusive of (1) $498,000 in bonds of a subsidiary building company and of (2) any new securities issued in satisfaction of claims of unsecured general creditors (D.R. 28556). (The claims of unsecured general creditors totaled $1,825,617, of which $447,011 represented allowed claims and the remaining $1,378,606 represented unliquidated claims (D.R. 28477).)

The Commission further found that this authorized total system capitalization should be reflected by the following capital structure, bearing annual charges as shown (D.R. 28565):

Fixed-interest debt		*Principal amount*	*Annual charges*
Equipment obligations (as of Jan. 1, 1948)		$21,174,664	$423,493 (@ 2%)
First-mortgage 4-percent bonds:			
Series A	$40,615,900.00		
Series B	83,409,899.50		
Series C	83,409,899.50		
		207,435,699	8,297,428
Total fixed-interest debt		228,610,363	8,720,921
Contingent-interest debt			
General-mortgage 4½-percent income bonds:			
Series A	143,594,632		
Series B	26,092,850		
		169,687,482	7,635,936
Total all debt		398,297,845	16,356,857
Stock			
5-percent preferred stock ($100 par value)		100,107,904	5,005,395
No-par common stock (at $100 per share):			
Class A ($5 dividend before class B dividend)	83,444,732		
Class B	30,081,471		
		113,526,203	
Total stock		213,634,107	5,005,395
Total capitalization		611,931,952	21,362,252 (before dividends on common stock)

The core of the Commission's Plan involves complete satisfaction of all creditor claims, partial satisfaction of preferred stockholders, but a determination that "the equity of the holders of Missouri Pacific common stock is without value and that such holders should not participate in the reorganization" (D.R. 28593). Preferred shareholders are allocated a total participation of $30,000,000 face amount in new System common stock, or, since preferred stock was outstanding as of January 1, 1948, in the par amount of $70,190,100, about $3 face amount of new common stock for each $7 par amount of

old preferred stock held (D.R. 28592). All secured creditors of the three principal debtors were allocated cash or securities in the new proposed company equal or exceeding in face amount the full amounts of their claims and in a manner according with their respective priorities as found by the Commission (D.R. 28575-28592).*

In arriving at the figure of $612,000,000 as the maximum permissible capitalization of the reorganized System, the Commission determined that "the greatest weight should be given to the past and prospective earnings of the system in order that ample coverage of fixed interest may be assured in years of relatively lean earnings, and all interest as well as a return to stockholders be reasonably assured in more favorable years" (D.R. 28553). Averaging total interest charges and prospective dividends (found to be slightly under 4¼ percent for mortgage bonds, $5 dividend annually for preferred stock, and at least 6% for common stock during periods of reasonably good earnings), the Commission concluded that about 4½ percent was a proper figure to use in capitalizing earnings (D.R. 28553-28554). On this basis, a capitalization of average annual System "earnings" (i.e., earnings available for interest payments after federal income and excess-profits taxes) for various periods would be as follows (D.R. 28554):

Period	*Length in years*	*Average earning*	*Capitalization*
1937-41	5	$15,455,508	$343,455,733
1942-1948	7	42,854,927	952,331,711
1937-1948	12	31,438,502	698,633,378
1946-1948	3	34,656,736	770,149,600

* We do not reproduce here the scheme of allocation of proposed new securities to existing security holders of the debtors. The allocation plan is presented in tabular form in Appendix "D" facing D. R. 28636. The gravamen of Petitioner's complaint is not the allocation of securities within the framework of the capitalization proposed, but the gross inadequacy of the capitalization.

The Commission, while stating that its conclusion was based on the "entire record" (D.R. 28556), obviously from its preoccupation with the trustee's "normal-year forecast" accorded great and almost conclusive weight to this factor. In the 1936 hearings upon which the Commission founded its original report in January 1940, the trustee forecast that System earnings available for interest in a normal year would be $22,059,052 (a figure reached by the Commission after adjusting the trustee's slightly lower figure for items which he omitted from consideration) (D.R. 28533). The trustee's forecast was not changed by the trustee at the further hearing in 1943 prior to the Commission's 1944 Supplemental Report and its formulation of the second plan of reorganization (*Ibid.*). Nor was its essential validity reexamined at the 1948 Commission hearing, although the trustee's chief executive officer testified that the development of the citrus industry and of the chemical industry in the Gulf area were of permanent nature, were unforeseen by the trustee when he made his forecast, and would result in additional earnings sufficient to raise the normal-year forecast to $26,622,731 (D.R. 28541, as corrected at D.R. 28654-28655). On this basis, the Commission adjusted the trustee's normal-year forecast to $25,450,000 from the $22,059,052 figure used in its 1944 (and also in its 1940 report), remarking without elaboration that this adjustment would sufficiently reflect "any economies of operation resulting from improvements to the debtor's properties since 1944 as well as improved traffic possibilities since that date" (D.R. 28545). Capitalization of the trustee's normal-year forecast yields a figure of $565,555,555 (D.R. 28554).

The trustee's normal-year forecast, when first made in 1936, was predicated on estimated total railway operating revenues of $129,140,357 (D.R. 28533; O.R. 776). It included the assumption that the years 1930 and 1931

were "pretty close to normal." (O.R. 1140.) The forecast, as used by the Commission in 1949, was adjusted upward by only 15% and then only to reflect partially the development of two industries, notwithstanding that total railway operating revenues in 1948 were $301,189,433, or 233% of the normal-year estimate (D.R. 28532) and notwithstanding the yawning gulf between 1949 and 1930-1931. The Commission found that "the record indicates that the average annual volume of traffic and gross operating revenues of the debtors in the future will be larger than the average for the 5 years or 10 years immediately preceding the war" but considered that increased costs of labor and materials might at least offset the increased gross revenues (D.R. 28542).

The Commission, having given "greatest weight" to hypothecation of earnings in arriving at an allowable System capitalization, necessarily gave some lesser and indeterminate weight to valuation figures. Its general philosophy and approach to the problem of determining maximum permissible valuation is, however, apparent in its treatment of valuation data. The Commission's Bureau of Valuation found that the original cost of the properties of the System, as of December 31, 1945, was $640,322,464; that the cost of reproduction new was $726,420,943; and that the cost of reproduction new less depreciation (but inclusive of the value of land and an allowance of $14,475,932 for working capital) was $540,096,823. In arriving at reproduction cost values, the Bureau of Valuation used prices purportedly as of December 31, 1945. It reported that, if 1946 prices were desired, it would be necessary to increase the 1945 prices by 15 percent, or to $639,463,286 (D.R. 28512-28513).

In fact, however, December 31, 1945 prices were not applied but reproduction costs were computed primarily on the basis of prewar prices. This important fact is substantially obscured in the Commission's Report and

the District Court was misled into believing that the Commission had determined reproduction cost on the basis of 1946 prices (R. 921). The Commission reported that "period prices as of December 31, 1945, were applied in determining cost of reproduction of the Missouri Pacific and the other debtors" but that *"these prices are based on an investigation of prices over a period of years,* giving appropriate consideration to the usual transitory nature of inflated prices occurring because of labor, material, and food shortages during a war or postwar period. *Primary consideration was given by the Bureau to prices prevailing during the immediate prewar period,* together with a long-term forecast of future price trends." (D.R. 28510, emphasis added.) In other words, the Commission did not use 1945 actual prices, but such prices as it considered would have prevailed in 1945 had they been more like what they were in prewar years and less like what they actually were in 1945. Had the Commission used actual 1946 prices, its reproduction cost less depreciation figure would have been about $800,000,000. (*Infra,* p. 42).

The Commission concluded that "for consideration in fixing permissible capitalization of the debtors, the period prices as of December 31, 1945, applied by the Bureau in determining cost of reproduction and cost of reproduction less depreciation should be increased 15 percent thus reflecting period prices as of 1946 * * *." It rejected the view that estimates respecting reproduction cost should reflect a price level more in accord with current realities than assumed 1945 prices, which were really prewar prices, increased by only 15 percent to yield 1946 prices. It said (D.R. 28510-28511):

> "In our opinion, it is not reasonable to assume that the current dislocation of the economy of the United States due to the war will prevail for the indefinite future. Adoption in the future of new and improved

methods of performing work and substituted use of new or equally efficient but less costly materials than those formerly used also may offset to some extent over a period of time increasing labor and material costs."

In one respect, the Commission considered its valuation data controlling and used it to decrease the otherwise permissible System capitalization. The capitalization of the New Orleans, reached by capitalizing the trustee's normal-year forecast at 4½ percent, would have been $104,444,444. The Commission thought that "clearly, the maximum capitalization of the New Orleans as a separate company should have a reasonable relationship to the value of its property." (D.R. 28561.) Its reproduction cost new less depreciation (after minor adjustments) being $81,541,286 and its balance sheet showing total assets of $96,836,047, the Commission concluded that upon the entire record the capitalization of the New Orleans, considered as a separate company, could not exceed $83,700,000 (*Ibid.*).

The Commission found that "in general, the System lines are in excellent condition with only a nominal amount of deferred maintenance existing." (D.R. 28555.) It further found that past and contemplated dieselization of power "have been resulting and will continue to result in important economies of operation" (*Ibid.*). From the initiation of bankruptcy proceedings in 1933 through 1947, gross additions and betterments of $170,018,753 had been made to the debtor's properties (D.R. 28544). "While additions and betterments do not always result either in obtaining additional traffic or in more economical operation, it is probable that a considerable part of the sums expended by the trustee has had that result." (*Ibid.*)

Other factors, highly favorable for the future outlook of the Missouri Pacific System, were apparent from the

Commission's Report but were not influential in its final determination. The industrial development of the region served by the System, reserved for detailed discussion, *infra* p. , was enormous. A comparison between the claims against the System as of January 1, 1943 (the effective date of the Commission's superseded plan) and as of January 1, 1948, is also impressive. Total claims against the System on the earlier date of $831,389,759 were reduced as of the later date to $785,925,798 (D.R. 28474-28475). This reduction was effected even during a period when additions and betterments were being made at a high rate, and large cash amounts were accumulating in the trustee's hands. Between the two dates in question, the Missouri Pacific Company repaid (1) notes owing to the Reconstruction Finance Corporation which, together with interest, totalled $33,053,142; (2) a bank debt, together with interest, of $8,472,174; (3) a debt of $2,074,103 to the Railroad Credit Corporation; and (4) division bonds in the amount, together with interest, of $24,385,653. The New Orleans had discharged its income-mortgage bonds in an amount, together with interest, of $2,501,231, and had paid off $8,072,830 in back interest on its first mortgage bonds; and the International paid off a debt of $416,703 to the Railroad Credit Corporation (*Ibid.*). While this degree of debt reduction was being effected, cash so accumulated in the hands of the trustee that, as of April 30, 1949, he held for the System cash or cash equivalents of $82,617,042 (D.R. 28575).

While the Commission noted a few such favorable factors, it could not have accorded them any weight since it adjusted the 1936 forecast of earnings by less than the amount of earnings being realized by the citrus and chemical developments. Its ultimate finding as to permissible capitalization of $612,000,000 is only 9% more than the permissible capitalization of $560,000,000 which it found in 1940 and reaffirmed in 1944 (R. 921). In

summary, it placed ultimate reliance for justification of this permissible capitalization on a forecast of normal-year earnings made in 1936 and only slightly increased in 1949 to reflect a portion of the earnings accruing from the development of citrus farming and the chemical industry along the Gulf Coast. The heart of its reasoning is contained in this passage (D.R. 28546):

> "In arriving at the above-recommended normal-year forecasts, the constantly increasing cost factor as related to increasing traffic volume has been considered *as well as a belief that business activity from 1946 through 1948 • • • has been at an unusually high level, which it is not reasonable to assume will be maintained uniformly in the future.*" [Emphasis added.]

Commissioner Alldredge, joined by Commissioner Aitchison, dissented in the belief that "the majority has been overly conservative in its estimate of future earnings of the Missouri Pacific system," and because "there are good reasons for believing that in the situation here presented future performance will be substantially better than the peacetime record of the past" (D.R. 28633-28634). They thought that, if post-1945 conditions would continue, an increase in allowable capitalization sufficient to permit participation by the common stockholders might well be made. Their specific proposal was for a conditional increase of $155,000,000 in capitalization, the conditional increase to become final at the end of three years if, during those three years, earnings available for interest should average not less than the $34,500,000 annually which they had averaged for 1946, 1947, and 1948. The conditional increase in capitalization would be evidenced by warrants or options, entitling present preferred and common stockholders to receive new Class B common stock if the condition were met at the end of the three-year period. (D.R. 28633-28636.)

Commissioner Cross did not participate. (D.R. 28636.) Commissioner Splawn, concurring in part, believed that the plan was erroneous in providing for the consolidation of all debtors into a single new operating company. As to the matter in question, he remarked in the course of his concurrence that "the report approximates future income as reasonably sufficient to support a capital structure of $612,000,000. There is persuasive evidence that these estimates may be rather conservative." (D.R. 28631.)

The District Court took the narrowest possible view of its function, particularly in respect of the crucial question of authorized capitalization. It noted that the Commission had before it evidence as to earnings from 1925 through 1948, limited testimony as to the development of the Southwestern area, and the improved condition of the properties and resulting operating economies, and that the Commission, in reaching its conclusion, expressed the belief that business activity from 1946 through 1948 could not reasonably be assumed to continue. (R. 919.) It held that the Commission's judgment as to the weight to be accorded the vast changes since the original bankruptcy was "final." (R. 922.) The District Court concluded, without any discussion of the propriety of patterning a 1948 reorganization on pre-1940 forecasts, that "it does not appear the Commission departed from statutory standards." (R. 919.)

The Court of Appeals similarly refused to review the crucial determinations of the Commission. It held that "the action of the Commission in determining the reorganization value was taken in the field where its conclusions are binding. Whether or not there was an equity in the common stock was for the Commission and the trial court did not err in approving its action." (C.R. 37.)

Since the Commission's fashioning of a reorganization plan involves a forecast of economic conditions, and since the proceeding reaches this Court after an interval of time which provides a basis for appraising the correctness of the forecast, it would be inappropriate to fail to acquaint this Court with the current condition of the Missouri Pacific System. Attached as Appendix B hereto is the testimony of Missouri Pacific's Board Chairman, given before the Interstate Commerce Commission on December 3, 1951, on the petition by the Group of Institutional Investors to require the Commission to report changes and developments. Among other things, it shows that the earnings accruing to the common stock of the Missouri Pacific Railroad Company were more than $26 per share in 1950.

The extent and amount of the arbitrary "taking" of property of Missouri Pacific common stockholders is established by this testimony. These become glaring when the assets and earnings of the Missouri Pacific and its 54 subsidiaries are consolidated, and are partially concealed by consolidating the assets and earnings of only the Missouri Pacific and its debtor subsidiaries as the Commission has consistently done. A consolidated balance sheet for the Missouri Pacific Railroad Company, and *all* its subsidiaries, introduced in the Commission hearing and covered in the attached testimony, shows total assets of $1,197,128,620 and an equity of Missouri Pacific stockholders of $152,269,600. The income accounts for 1950 show income available for fixed charges of $57,116,723 and an equity of Missouri Pacific stockholders in such income of $25,419,488.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In failing to suspend the proceedings before it at a time when Section 3 of the Act of April 9, 1948 directed that further proceedings for confirmation of the reorganization plan be suspended;

(2) In proceeding to enter its judgment and issue its opinion of August 14, 1951;

(3) In failing to grant Petitioner's motion for vacation of its judgment and withdrawal of its supporting opinion of August 14, 1951;

(4) In affirming the judgment of the District Court approving the Plan of Reorganization for the Missouri Pacific System certified by the Commission;

(5) In holding that the maximum allowable capitalization for the Missouri Pacific System fixed by the Commission was "binding";

(6) In affirming the holding of the District Court that the Commission had not erred in fixing the maximum allowable capitalization;

(7) In holding that the Commission's estimates of earning power were "supported by credible evidence";

(8) In holding that the Commission's reports show that the Commission, in determining capitalization, gave consideration to past, present and prospective earnings of the System;

(9) In holding that the Commission gave full consideration to the earning power of the New Orleans;

(10) In holding that the Commission's reports show that the Commission had before it evidence of reproduction cost new and of reproduction cost less depreciation;

(11) In holding that the question whether there was an equity in Missouri Pacific common stock was for the Commission, and that the District Court did not err in approving its action;

(12) In holding that there was no sound basis for a finding that the common stock has value or that the equity of the preferred stock is greater than found by the Commission and approved by the District Court;

(13) In affirming a District Court judgment approving a Commission plan of reorganization for Missouri Pacific which would wipe out its common stockholders.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals, by failing to act upon your Petitioner's motion for vacation of its order and withdrawal of its supporting opinion, has in effect denied the motion. The motion requires a construction of the important Section 5 of the Act of April 9, 1948, which has never received judicial interpretation or otherwise been before any court. A novel question is thus presented, involving an interpretation of a recent Congressional enactment important in all instances of railroad reorganization.*

The failure of the Court of Appeals to act upon the motion leaves uncertain the views it may entertain as to

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* The motion to vacate the judgment was filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure which provides that such a motion does not affect the finality of the judgment. The case is unlike *Leishman* v. *Associated Wholesale Electric Co.*, 318 U. S. 203, 63 Sup. Ct. 543, holding that the time for appeal does not begin to run until disposition of a motion under Rule 52(b). Petitioner's motion would not have been timely under Rule 52(b). See *Jusino* v. *Morales & Tio*, 139 F. 2d 946 (C.A. 1, 1944). *Cf. United States* v. *Schlotfeldt*, 136 F. 2d 935 (C.A. 7, 1943).

the effect of the Act. The Group of Institutional Investors, in opposing the motion, suggested only one reason why Section 3 was inapplicable under the circumstances and thus did not preclude the actions of the Court of Appeals in rendering its opinion and entering a judgment on August 14, 1951. The Group contended that the filing of a petition for Commission review of a reorganization plan, within the terms of the Act, had the effect of suspending only the final proceeding for technical "confirmation" of a plan but no other proceedings prerequisite to, or which are necessary steps along the path to, the ultimate technical act of entering a judgment of confirmation.

We submit that this contention of the Group is seriously erroneous and fraught with mischief for all future railroad reorganization proceedings. On the present state of the record, and unless this Court acts, this view may become widely accepted. The proper interpretation and effect of an important Congressional enactment may thus become initially fixed without there being any assurance that the matter received appropriate judicial consideration.

The construction, which the Group urged and which the Court of Appeals by its inaction appears to have stamped with approval, totally overlooks the scheme of Section 77 of the Bankruptcy Act. Section 77 undertook to utilize both the administrative expertness and specialized knowledge of the Interstate Commerce Commission, and the judicial capabilities of the United States courts, in achieving plans of reorganization for debtor railroad companies which would be equitable and fair to all parties concerned. The Congress acted with care in delimiting the respective functions of Commission and court in Section 77. See *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 468-472, 63 Sup. Ct. 692, 705-707. The scheme contemplates entrusting the Commission with the primary

responsibility for the formation of an appropriate plan of reoganization; the function of the court is the more limited one of satisfying itself that the plan is fair and equitable and was arrived at pursuant to legal standards of fairness. As the Commission's function is "formulation," so the court's function is "confirmation."

While Section 77 provides detailed directions as to procedural steps to be taken at various stages of the passage of a reorganization plan through both Commission and court, it is plain that all judicial proceedings have as a single goal judicial "confirmation" of the Commission plan. All judicial proceedings involving a plan are necessarily "proceedings for the confirmation of the plan." The very function and purpose of all the proceedings are to determine the ultimate question of confirmation *vel non*, and they do not lose their character as "proceedings for confirmation" merely because they are inevitable steps along the path.

What we have suggested would seem to be the necessary meaning of Section 3(a)(5), if its language alone is considered. When consideration is also given to the intention of Congress in enacting the section, this interpretation becomes compelling and unavoidable. The legislative history discloses a Congressional belief that courts were too often being called upon to consider plans of reorganization which the passage of time and the changing of conditions had rendered stale and outmoded.* Con-

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* The Senate Committee on Interstate and Foreign Commerce explained the need for this section of the Act (Sen. Rep. 897, 80th Cong. 2nd Sess.):

> "In the opinion of the committee, the need for this type of re-examination and reconsideration is of the greatest importance where bankruptcy proceedings are pending for many years, as they generally are in most railroad cases. Evidence before the committee confirms the fact that the financial condition of railroads in reorganization proceedings changes consid-

gress, therefore, permitted parties to reorganization plans pending in the courts to require their reconsideration by the Commission. The key that unlocks the act is the simple passage of time, not the particular stage the judicial proceedings have reached, provided, of course, the judicial proceedings have not been finalized. It mattered not to Congress, as shown by the first three paragraphs of Section 3(a) what stage in the courts the proceedings had reached. Any party to a plan could require the referral of the plan to the Commission, provided only that eighteen months had passed since the Commission's certification of the plan to the court.

The interpretation which the Court of Appeals seems to have adopted by default, would impute to Congress the intention to tolerate the highly unseemly situation in which a reorganization plan would be moving forward coincidentally before the Commission and the courts. This would be true, as the Court of Appeals may have reasoned, because, while the Commission is determining whether its plan requires reconsideration, the court may be only determining whether it is fair and equitable—a matter merely of "approval" and not a "proceeding for

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erably in the long periods which elapse from the time the Commission approves a plan until it is finally confirmed. There is no requirement here that the plan be changed or altered; that lies within the discretion of the Commission. But Commission representatives have testified that under existing section 77 procedures, it has no authority to volunteer advice to the court that relevant facts and conditions which affect the fairness or equitability of a reorganization plan have changed. Witnesses representing some railroads and some security holders have testified that this has resulted, in many cases, in the consummation of some reorganizations which have failed to render equity to certain classes of security holders who had no remedy or recourse at law. The committee believes that the law should be clarified and the duty of the Commission made plain. This paragraph, and the succeeding paragraphs of this section, are intended to remedy this lack of liaison between courts and the Commission."

confirmation." * But, Section 3(a), particularly in the light of its legislative history, convincingly discloses that Congress wished the parties to have a right to require the Commission to look at possibly stale plans, free and uninhibited by the continuance of court proceedings. Every action taken by a court, and particularly actions which the Group would technically narrow to proceedings for "approval," might be of substantial influence on the Commission.

Obviously, there is no satisfactory solution except the one prescribed by Congress, halting further proceedings of all kinds in regard to a possibly stale plan until the question whether it should be reconsidered is determined by the Commission. The courts ought not to be in the false position of continuing proceedings respecting a plan while the necessity for its reconsideration is being determined. It is unseemly for a court to determine the overall propriety of a reorganization plan at a time when it has just referred to the Commission a petition requiring the Commission to determine its need to reconsider and possibly revise the plan. Inevitably, court and Commission determinations will be seriously overlapping. It is unreasonable to impute to Congress the intention to countenance and require such anomalous situations.

The legislative history is confirmatory of our view. Senate Report 897 on the bill provides that filing the petition "suspends further action by the court involving

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* Precisely this is occurring now. Pursuant to its order of September 28, 1951, the Commission held a hearing (extending from November 27 to December 3, 1951, involving about 1200 pages of testimony and 175 exhibits) on the Group's petition requiring it to report changes and developments to the court. Proposed findings are to be submitted by the parties by January 28, 1952. Should this Court reach the merits of the reorganization plan, the danger of conflict between court and Commission is apparent.

confirmation of the old reorganization plan." Here, again, it is plain that the language "action by the court involving confirmation" is an inclusive phrase descriptive of the judicial function, which is, in its briefest statement, "confirmation." A few pages earlier, Senate Report 897 employed the language: "Evidence before the committee confirms the fact that the financial condition of railroads in reorganization proceedings changes considerably in the long periods which elapse from the time the Commission approves a plan until it is *finally confirmed.*" The language we have italicized demonstrates that Congress had in mind that the total judicial function looks toward "confirmation," and that "proceedings for the confirmation of the plan" means all judicial proceedings upon the plan.

If Congress had in mind that Section 3(a)(5) would suspend some, but not all, judicial proceedings on the plan, it would be normal to anticipate that this unusual technique would be most carefully clarified, preferably in the statute itself, but at least in the underlying legislative history. But there is no indication in the legislative history to demonstrate Congressional intention to resort to this unusual technique. Both Senate Report 897 and Conference Report No. 1603, Statement of the Managers on the Part of the House, employ identical language in explaining that what is now Section 3(a)(5) is:

> "a procedural provision to make certain that petitions alleging new facts or developments must be filed with the court and referred to the Commission. Such action apprises the court of the legal action taken under the new law and suspends further action by the court involving confirmation of the old reorganization plan. The court, of course, retains custody of the property and of the case pending action and report by the Commission."

This language is entirely inconsistent with any interpretation other than that we urge. If court proceedings

upon the plan continue in some instances, even while the necessity for its reconsideration is being determined by the Commission, then there is no inclusive need to advise the court of the petition. The court would need to be advised only in the event its proceedings were of the particular type requiring suspension. Furthermore, the final sentence of the quoted language cannot be squared with the view that less than all judicial proceedings on a plan are suspended. The Senate and House legislators would not have reported so flatly that, "*of course*," the court retains custody of the property and the case pending the Commission report, if the fact were that the court not only retains custody of the case but is expected to continue its consideration up to a point approaching finality.

There is no reason to believe that Congress desired the courts to continue with those proceedings which, narrowly and technically under Section 205(e), may call for judicial "approval" of the plan. In the first instance, this interpretation assumes that Congress requires the courts to waste their time and energies in continuing with proceedings which may shortly be voided. It further assumes that Congress directed the courts to continue proceedings which an administrative tribunal may at any moment render moot. But the courts are no more accustomed to performing vain acts than they are to resolving controversies which are hypothetical or may become so. *Cf. Muskrat* v. *United States*, 219 U.S. 346.

In the second place, for the courts to proceed with consideration of a plan while the Commission determines whether that plan needs reconsideration, is to invite collision between court and Commission. If this were done, a court might issue an opinion depicting a plan as fair and equitable in the light of all factors, including current conditions, on the precise day the Commission issues a report concluding the plan requires reconsider-

ation in order to be fair and equitable. The converse is equally possible. It is not reasonable to suppose that Congress contemplated for a moment such an anomaly in the administration of justice.

We submit that, in the light of the considerations above adduced, the Court of Appeals erred in entering its order and rendering its opinion of August 14, 1951. In any event, an important and novel question of statutory construction is presented on which the definitive views of this Court are important.

II.

A. The case, on the merits of the reorganization plan, is one of unusually wide public importance. The Missouri Pacific System is one of the nation's great railroad properties, involving upwards of a billion dollars. It provides service to an area of our nation whose recent growth and early future potentialities are hardly less than phenomenal. It is of major importance to the Missouri Pacific System, to its employees, to its patrons and shippers, and to the important area which it serves that the reorganization of this System be soundly and appropriately planned. This Court should not preclude itself from reviewing the propriety of such an important administrative and judicial determination as the adoption of a plan of reorganization for the Missouri Pacific System.

All cases of railroad reorganization are of wide public importance, irrespective of the value of the properties involved. The infrequent opinions of this Court are eagerly awaited to furnish guiding principles to be applied in the complex and delicate adjustment of interests necessarily involved in all reorganizations. Questions of the public interest are dominant in all cases of railroad reorganization. Investors are entitled to full advice as to the basis upon which the Commission may wipe out their investments.

B. It would be anomalous for this Court to refuse to review the plan of reorganization for the Missouri Pacific System which the Commission has devised. Applicants before the Commission, disappointed by its determinations, usually can require this Court as a matter of right to review them. In any of the wide variety of circumstances under which a litigant can challenge a Commission order before a specially constituted three-judge district court (see Sections 2321-2325, Title 28 U. S. Code), direct appeal as of right to this Court is available (Section 1253, Title 28 U. S. Code). Commission determinations, trifling in their consequences and devoid of public interest or legal significance, can thus be brought before this Court.

Under these circumstances, it would be anomalous, indeed, if this Court should refuse to review the Commission's plan of reorganization for the Missouri Pacific System. The Commission has few, if any, functions more important than that of formulating plans of reorganization for major railroad properties. Review by this Court is unusually desirable, both in the light of the importance of the case presented and the importance of the guiding principles established.

Moreover, it is of significance that this Court has already reviewed one aspect of these reorganization proceedings, collateral to the main issues involved. *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 68 Sup. Ct. 1454, rehearing denied, 335 U.S. 837, 69 Sup. Ct. 12. Comstock, the holder of Missouri Pacific Railroad Company 5¼% secured serial gold bonds, whose objections in the District Court and the Court of Appeals to the allowance of a claim of approximately $10,000,000 against the New Orleans by its parent Missouri Pacific were denied, successfully sought review by this Court even though he had never laid his objection before the Commission.

C. We submit that the decision below is erroneous. The Court of Appeals seriously misconceived the scope

of review, and both declined to exercise any reviewing function and sanctioned the District Court's similar declination. By the terms of paragraph (e) of Section 77 of the Bankruptcy Act (11 U.S.C. § 205(e)), the district court shall approve any reorganization plan certified to it by the Commission only "if *satisfied* that • • • it complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders • • •."

In the *Comstock* case, *supra* at 227, 68 Sup. Ct. at 1462, this Court spoke of the "broad responsibility laid upon the court for the equity and fairness of the plan as a whole," and added that "the court will be diligent to protect itself and the public from approval of unfair plans, even by default, and may take for its own use evidence no party would have a right to force upon it." In *Ecker* v. *Western Pacific R. Corp.*, 318 U.S. 448, 63 Sup. Ct. 692, this Court stated in broad terms the relationship between the administrative and judicial functions contemplated by Congress in rail reorganizations. It said:

> "Congress outlined the course reorganization is to follow. It established standards for administration and placed in the hands of the Commission the primary responsibility for the development of a suitable plan. When examined to learn the purpose of its enactment, Section 77 manifests the intention of Congress to place reorganization under the leadership of the Commission subject to a degree of participation by the court."

The Court of Appeals, as did the District Court before it, disregarded these admonitions. On the critical question of maximum allowable capitalization, it plainly re-

fused to accord any review other than in form and sustained a similar refusal by the District Court. It held that the Commission's action in fixing a maximum allowable capitalization of $612,000,000 "was taken in the field where its conclusions are binding." (C.R. 37.) It accepted no responsibility for the equity and fairness of the plan in its most crucial aspect, much less the "broad responsibility" which this Court recognized. It misread this Court's references to the Commission's "leadership" and "primary responsibility," in respect of the development of suitable plans, as equivalent to according absolute and binding finality to Commission determinations.

It is important to observe that in rail reorganization cases the judicial function vis-a-vis the administrative function is different in kind from that obtaining in the normal case of judicial review of administratve functions. Section 77 of the Bankruptcy Act contemplates a substantially unique situation wherein Congress has devised a scheme for drawing upon the distinctive capabilities of the judiciary and of the expert administrative tribunal. An unusual court-Commission relationship of intertwined responsibility is created. The Court has a "degree of participation" in, and a "broad responsibility" for, reorganization plans: by the terms of the statute, it must be "satisfied" that the plan is fair and equitable. Both the Court of Appeals and the District Court were misled into the belief that they were called upon only to examine the Commission's plan of reorganization to ascertain, as in normal administrative law cases, whether the plan had some "substantial" evidence in its support, more than a scintilla. Even on this mistaken assumption, the Court of Appeals so limited its examination of the issues before it as to accord an inadequate review. *Cf. Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 71 Sup. Ct. 456.

The Commission's plan cannot withstand the most cursory examination. It rests on economic premises and predictions many of which are grossly erroneous or have been proven incorrect. The Commission adamantly refused to credit the evidence of the decade in which the plan was drawn and persisted in reverting to the 'thirties for its basic economic data and philosophy. Its last plan, devised in 1949, assumes that the economic outlook generally, and particularly for the Missouri Pacific System, was substantially less favorable than was the outlook in 1940 when it devised its first plan on the basis of evidence taken in early 1936 and necessarily reflecting the results of still earlier years.

While the Commission's Fourth and Fifth Supplemental Reports include several conclusory statements to the effect that it based its maximum allowable capitalization on the "entire record," the reports themselves plainly disclose the contrary. Its maximum allowable capitalization is cornerstoned on a forecast of "normal-year" earnings made in 1936, with only slight modification on mere tidbits of the available evidence to reflect the enormous economic changes and developments that have since occurred. The invalidity of the forecast is amply manifest by comparing the prediction of gross operating revenues on which it was framed and the present realities. The forecast assumed average annual gross revenues of $129,000,000; in 1948, the last year available to the Commission, they were over $300,000,000.*

The Commission did not reexamine the validity of the forecast first made in 1936. It assumed its validity in 1949, and then adjusted it, but only partially, to reflect two localized developments between 1936 and 1949. The trustee's Chief Executive Officer testified in the 1948

* According to the Department of Commerce, gross national product rose from 82 billion in 1936 to 282 billion dollars in 1950. Dept. of Commerce, National Income Supplement, Survey of Current Business, July 1951, p. 150.

hearing that the development of the citrus and chemical industries alone would add net earnings of $4,563,679 to the System. The addition of this amount would increase the "normal-year" forecast to $26,622,731. The Commission did not even increase its forecast by the amount of earnings to be realized from only these two sources, but instead lowered the forecast to $25,450,000.

From the face of the Commission's Fourth Supplemental Report, it is plain it gave no heed to a mass of other evidence before it. Nor does it appear even to have apprehended the implications of the evidence to which it purported to give weight. It increased the 1936 forecast by an amount which *partially* reflected the increased earnings to be realized from traffic *originated* by the chemical and the citrus developments. It gave no recognition to the fact that these developments would inevitably have a considerable effect on building up generally the area of their location and would result in greatly increased *inbound* traffic. It likewise gave no attention to "very substantial increases" in traffic other than chemical and citrus, about which the trustee's Chief Executive Officer testified only on *cross-examination* (D.R. 28538-28539).

The Commission, although it made brief reference in its Fourth Supplemental Report to some startling developments (D.R. 28538-28540), obviously concluded they were entitled to no weight. Among these developments, all based upon or in the words of the trustee's Chief Executive Officer, are: (1) Between January 1, 1940 and January 1, 1948, there was an "enormous expansion of peacetime industry which is creating tonnage for transportation by Missouri Pacific Lines. There were 300 industries which expanded their plants with an estimated new capital investment of $449,653,875 and there were 2,248 entirely new industries having an estimated capital investment of $609,737,925, or a total new investment of about $1,059,391,800. As of December 31, 1947, when this data were prepared, the new industries had given

us in the preceding 12 months 292,302 cars of freight, which is equivalent to about 13 percent of all the carload freight handled by the railroad in the year 1947" (R. 38-39); (2) the Rio Grande Valley fruit and vegetable development, large though it was in 1947, is capable of great expansion. A treaty with Mexico contemplated the construction of three new dams, one of which alone would make possible doubling the Valley's then irrigated area (R. 36); (3) oil production and refining along the Texas Coast took "an enormous spurt" about 1939 which was later extended, and during the war there was "tremendous construction" in the refining industry (R. 37); and (4) between 1940 and 1947, when the population of the United States grew 6%, the population of counties served by the Missouri Pacific System grew 9%. Much of this growth took place along the Gulf Coast where it would be of particular benefit to the System. Also, "it is obvious that whenever one section of the country is growing more rapidly than another, there will be a corresponding increase in all of the development and activities that go to make up a complex civilization" (R. 42-43).*

The error of the Commission's forecast of earnings is not merely a matter of speculative opinion. It has proven seriously erroneous. The forecast ($22,059,052 when first adopted in 1940 and $25,450,000 following adjustment in 1949) has been greatly exceeded in every one of the eleven years since it was made. The System earnings are:**

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* For the period from 1940 to 1946, the growth for the area served by the Missouri Pacific System, compared with the growth of the United States as a whole, was at a rate which was 9% greater as to total income payments and 10% greater as to manufacturing wages and salaries (R. 143-145).

** Figures for the last four years are those supplied by the trustee's Chief Accounting and Financial Officer to the Commission at its further hearing in November-December, 1951. Exhibits 1039-1040.

1941	$30,607,244	1946	$30,369,166
1942	$66,205,617	1947	$32,946,964
1943	$44,717,858	1948	$40,707,556
1944	$47,833,479	1949	$28,925,182
1945	$34,251,324	1950	$45,595,589
	1951 (est.)	$35,645,000 (plus)	

There is ample reason to believe the figures for the last four years may be abnormally low. The year 1949, when the System's earnings were at their eleven year low, is the year of the 46 day strike which completely paralyzed the railroad and is not representative (D.R. 28686). In 1949-1950, severe weather conditions seriously curtailed the citrus crop.* In 1951, disastrous floods cost the System millions of dollars.** Moreover, these earnings fail to reflect actual dollar savings of at least $280,948, and other advantages and economies that cannot be measured in dollars, which the Commission found would result from the consolidation of all the debtor railroads into the single company it proposed (D.R. 28656).

It is manifest error for the Commission to predicate maximum allowable capitalization on an earnings forecast so grievously incorrect. Its conclusions on earnings were made in the face of the record, and lack that "material evidence" which this Court has said is essential for the support of its conclusions in both the *Western Pacific* and *St. Paul* cases. When the Commission acted in 1949 to forecast earnings on the basis of 1936

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* See pages 6527-6529 of the transcript of the hearing referred to in the foregoing footnote.

** Expenses for rehabilitation of flood damage were about $2,500,000 (Comm. Tr. pp. 6394, 6442). Traffic yielding about $3,000,000 in gross revenue was lost to the System because of the flood (Comm. Tr. p. 6625), resulting in a loss of net income between $1,000,000 and $1,500,000 (Comm. Tr. p. 6896). It is also to be noted that recently granted mail pay adjustments retroactive to January 1, 1951, and land grant "cutbacks" will increase the estimated 1951 earnings approximately $2,000,000 (Comm. Tr., pp. 6426-6430).

testimony, it committed error of a type which the judiciary is required to correct.

The Commission's conclusions on reproduction cost are equally erroneous and founded on stale evidence, not measuring up to the dignity of "material evidence." It is error of a quality and seriousness requiring judicial correction to determine 1945 and 1946 reproduction costs, not on the basis of prices then current, but on the basis of fictitious and assumed prices which are actually prewar prices.

The magnitude of the Commission's error in this respect is readily determinable. The Engineering Section of the Commission's Bureau of Valuation maintains price indices representing the cost of constructing railroad properties. The indices are issued for each railroad property account, and in weighted average form for each of eight regions into which the country is divided and for all regions combined. The figure for any year represents an average level of railroad construction costs for that year (R. 156-157). The indices are relative to 100 for the base period from 1910 to 1914 (R. 158).

The Commission's Bureau of Valuation computed the System's reproduction cost as of December 31, 1945, by taking the physical property as of that date, valuing it at base prices, and then applying a combined weighted average price multiplier for road and equipment of 152. The price multiplier for the southwestern region was 153 for 1940 and averaged about 151 from 1937 to 1940. For the United States as a whole, the price multiplier was 153 in 1940. (R. 159.) For the years 1945, 1946, 1947 and 1948, the weighted average price multipliers for the southwestern region were 207, 227, 252 and 278. (See 61st Annual Report of the Commission, p. 123; 62nd Annual Report of the Commission, p. 129; 63rd Annual Report of the Commission, p. 128.)

When the Commission increased the fictitious 1945 reproduction costs by 15% to obtain supposed 1946 reproduction costs, it was in effect increasing the price multiplier of 152 by 15%, or using a price multiplier of about 175 (R. 159). Had it used the actual price multiplier of 227 for the year 1946, its figure for reproduction cost less depreciation (but including value of land and rights, net additions and working capital) would approximate $800,000,000 instead of the $639,463,286 figure actually determined. Had the Commission used the 1948 price multiplier of 278, its ultimate figure would have been about $912,000,000.

The Commission's determination of maximum allowable capitalization for the reorganized Missouri Pacific System thus involved an identical error, whether it was engaged in forecasting earnings or computing reproduction costs. In both instances, it wiped out the experience of the 'forties and persisted in reverting to the 'thirties for basic data on revenues, earnings, prices, and the like.* Its major premise, sometimes articulated and always present, was that the 'thirties represented "normalcy" and that the 'forties were years of abnormality not entitled to consideration. This philosophy is particularly unappealing from the viewpoint of 1952 when the national defense policy, involving unavoidably huge federal expenditures and a consequent high level of economic activity, is well established. How seriously erroneous was the Commission's prophecy is exemplified by its expressed belief that "business activity from 1946 through 1948 * * * has been at an unusually high level" (D.R. 28546). Its oblivion to the times is apparent from its pallid statement that "the record indicates that the average annual volume of traffic and gross operating revenues of the debtors in the future will be larger than

* It was clear to the dissenters that the majority fashioned its Plan on pre-1940 data. Their dissent was predicated on the belief that "future performance will be substantially better than *the peacetime record of the past*" (D.R. 28634).

the average for the five years or ten years immediately preceding the war." (D.R. 28542.)

The refusal of the courts below to accord any judicial review of the Commission's determinations grew out of an erroneous and unprecedented belief in the sacrosanctity of those determinations, and can now only be corrected by this Court's according review.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

BURTON K. WHEELER
EDWARD K. WHEELER
ROBERT G. SEAKS
Counsel for Petitioner

Of Counsel:
WHEELER & WHEELER
704 Southern Building
Washington 5, D. C.
January 1952

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MISSOURI PACIFIC RAILROAD COMPANY,
and others,

Appellants,

v.

GROUP OF INSTITUTIONAL INVESTORS, ETC.,
et al,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

Nos. 14, 264-14, 274

MOTION OF MISSOURI PACIFIC RAILROAD COMPANY TO VACATE THE JUDGMENT.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT:

Comes now Missouri Pacific Railroad Company, a principal debtor in the above-entitled cause, and moves this Honorable Court to vacate and set aside the judgment heretofore made and entered in said cause on the fourteenth day of August, 1951, and to withdraw its supporting opinion rendered on the same date, for the following reasons and upon the following grounds:

1. Because the judgment is void as having been entered in violation of the Act of April 9, 1948 (11 U.S.C. § 208) and at a time when, under such Act, all proceedings were to have been suspended. Pursuant to the pro-

visions of such Act, the Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company filed a petition dated July 12, 1951 (or before the entry of the judgment herein prayed to be vacated), requesting that the Interstate Commerce Commission report any changes, facts or developments which had occurred since the Commission's approval of the Plan of Reorganization which had not been provided for in the Plan and which in the opinion of the Commission made it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise the Plan in order to insure that, if put into effect, it should then in the opinion of the Commission be fair and equitable and in the public interest and compatible with the provisions of 11 U.S.C. § 208 and Section 77 of the Bankruptcy Act, as amended. The United States District Court, Eastern Division, Eastern Judicial District of Missouri, thereupon entered its order dated July 13, 1951, referring the petition to the Interstate Commerce Commission. The Act of April 9, 1948, expressly provides that upon the filing of such a petition "all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission * * *." (11 U.S.C. § 208(a)(5))

A memorandum of points and authorities in support of this motion is attached.

MISSOURI PACIFIC RAILROAD COMPANY

By /s/ (EDWARD K. WHEELER)
EDWARD K. WHEELER
Its Attorney

Of Counsel:
WHEELER & WHEELER
704 Southern Building
Washington 5, D. C.

Dated: October 17, 1951

AFFIDAVIT OF SERVICE

I hereby certify that copies of the foregoing motion, and of the attached memorandum of points and authorities in support thereof, were served upon counsel for all parties of record.

/s/ (EDWARD K. WHEELER)
EDWARD K. WHEELER

Washington, D. C.
October 17, 1951

APPENDIX B

TESTIMONY OF T. C. DAVIS, CHAIRMAN OF THE BOARD, MISSOURI PACIFIC RAILROAD COMPANY BEFORE THE INTERSTATE COMMERCE COMMISSION ON DECEMBER 3, 1951

The plan of reorganization certified to the court in December, 1949, carried an effective date of January 1, 1948, and was largely predicated on the balance sheet figures of December 31, 1947. The principal of stocks and bonds outstanding at that time and the interest accumulations to that date were provided for in the plan or otherwise disposed of.

The consolidated balance sheet for MOP, NOT&M and IGN as of December 31, 1947, after writing off the MOP investment in NOT&M and IGN plus the investment of NOT&M in IGN and assuming the issuance of new securities provided by the plan plus the use of cash, shows an uncapitalized surplus of $127,082,036.

In other words, the balance sheet of the new company as of January 1, 1948 would show a surplus of $127,082,036. In this set-up, the NOT&M, even though admitted by the ICC in its report to be worth $83,700,000,

as a separate company, is capitalized at approximately $44,000,000 in the pending plan.

Furthermore, assets of the MOP are carried at book value, in many cases based on acquisition cost of more than 20 years ago. In cases where acquisitions have proven unprofitable or unsound, such properties have in several instances been written off. On the other hand, those properties that have proven profitable have not been written up to their true value. For instance, the American Refrigerator Transit with a surplus in excess of $20,000,000 is still carried on the MOP books at $378,-300. MOP owns 71 per cent of that company and its surplus, represented by cash, properties and earning power.

Another example is the ownership of Texas and Pacific, carried on the books of MOP at $25,557,744, of which $23,000,000 is in preferred stock. This preferred is absolutely worth par and could readily be retired by the T&P through the use of its surplus cash and/or the sale to the public of T&P debentures, and this would serve to lessen the tax requirement of T&P.

The trustee could readily exercise his control of T&P to accomplish this.

Cash received would accrue to the first and refunding bonds and should be paid to these bondholders in liquidation of their claim. The retirement of the T&P preferred would in no way affect the control of that property by MOP, as the latter would continue to own a 59 per cent interest in T&P by virtue of the common stockholding.

T&P surplus as of December 31, 1950 was $80,416,073 and this is 59 per cent owned by MOP. It seems probable that this surplus item will approximate $85,000,000 by the end of 1951. I am sure I am too conservative.

In these two subsidiaries alone there is now more than $100,000,000 of surplus largely belonging to MOP and for which only the value of $2,233,044 is considered in this proposed reorganization plan.

A consolidation of the balance sheets of Missouri Pacific, NOT&M and IGN as of December 31, 1947 shows a deficit surplus account of $35,658,572. This is not a true deficit as the actual values of MOP investments in subsidiaries other than NOT&M and IGN are not considered at their real value.

However, this is the basis for the pending reorganization plan. Applying this balance sheet to the new company which means the cancellation of old securities and the issuance of new as provided in the plan, there would remain a surplus, uncapitalized of approximately $127,082,036, as of that date. If it is the intention of the ICC to write off these values and restate them at the hypothetical value set up by the ICC in its report, the company and its security holders would suffer a very severe tax loss. On any sound approach to the reorganization of the system and the issuance of new securities, the old capitalization must stand.

Now let's see what has happened since this plan was formulated with an effective date of January 1, 1948.

The consolidated balance sheet of Missouri Pacific, NOT&M and IGN for the year ending December 31, 1950, shows earned surplus of $11,449,366 and this includes a deficit surplus of the IGN amounting to $20,869,482. The improvement in the consolidated surplus for the three year period amounts to $47,107,938. In other words, we go from a deficit position of approximately $35,000,000 to a credit surplus of approximately $11,500,000 or a net increase of some $47,000,000.

And I would like to say that I am talking about earned surplus not total surplus, because these figures differ

materially, and a comparison would be even stronger in my standpoint.

Applying the issuance of new securities to the 1950 balance sheet and including all accruals on securities to be issued, we find a surplus of $176,903,261 uncapitalized. Now I am talking about the 1950 balance sheet. In other words, this surplus is readily usable for the satisfaction of the claims of the preferred and common stockholders and should be so used. The bond claims have already been satisfied.

During the period from January 1, 1948 to January 1, 1951, the trustee has spent for road—taking road at net—and equipment the sum of $110,832,619, and for equipment alone $82,431,769.

Mr. Boyden, I would like to say here, these figures are all taken from the published figures, and not taken from the exhibits put in here. There may be some difference in those, because I don't know what subsidiaries were included in the figures in the exhibits. These are taken from the Price Waterhouse audits, and are conclusive.

A substantial portion of the money spent for equipment has not been financed and the actual cash cost for the purchase of equipment amounted to $38,581,221. The amount financed equalled $43,850,548. There has been spent for retirement of equipment obligations during this period, $15,263,072. Actually, the trustee has, during this period made a cash outlay for equipment, the sum of $53,844,293. Notwithstanding this severe drain on the cash resources of the railroad, cash has again reached the staggering proportion of more than $105,000,000.

The Commission, the trustee, and in fact everyone connected in any way with this reorganization knows full well that the NOT&M is entirely solvent. In fact, as before stated, the ICC has indicated that the reorganization of the NOT&M alone is capitalizable at $83,700,-

000. This road has outstanding approximately $40,000,000 of bonds and owes a claim to the Missouri Pacific of approximately $10,000,000. The interest accrual on this claim of about another $10,000,000.

Alleghany, recognizing the soundness of the NOT&M, offered to finance the claim to the extent of $20,000,000, but the trustee declined to discuss the matter on the ground that a plan of reorganization was before the court.

* * * *

The surplus deficit shown for NOT&M in the December 31, 1947 balance sheet is misleading and is entirely refuted by the Price-Waterhouse audits. An exhibit filed in these proceedings shows that surplus as of September 30, 1951 stands at $15,773,183.

The only possible problem in this reorganization is the IGN but there again we find MOP advances to it drawing interest and affecting this road's surplus while at the same time the trustee has written off on the books of the Missouri Pacific the entire value of this claim amounting to $2,748,218. On the books of the IGN this same claim is carried as a debt and there has been accumulated to December 31, 1950 $2,427,924 of interest.

The IGN thus acknowledges its debt to MOP in the sum of $5,222,016. Thus, the interest accrual on the NOT&M books and on the IGN books has not been picked up on the books of the Missouri Pacific. The total of this interest alone is in excess of $13,000,000 and with the principal of the claims now amounts to more than $25,000,000.

In other words, this system reorganization penalizes the Missouri Pacific by more than $25,000,000 of debt owed it by NOT&M and IGN. These debts plus the investment in NOT&M common amount to $42,000,000. Think of it, these assets, belonging to the MOP stock-

holders are blithely written off in this system reorganization.

The first mortgage bonds of the IGN can easily be serviced by the railroad and there is no cause or reason for the first mortgage bondholders of the IGN to suffer the loss which this plan inflicts upon them. These bonds are entirely sound. It is incomprehensible that the committee representing the first mortgage bondholders of the IGN permit, let alone support the present reorganization plan.

However, this committee did suggest that the IGN be reorganized separately. The solution of this problem of reorganization can be found in the separate reorganization of these three corporations. Let me add now that under any reasonable reorganization of these three properties, the Missouri Pacific will not lose control of the NOT&M nor the IGN, but MOP's investment in these companies will properly be reflected in the assets of the parent company and these values will accrue to the stockholders. In my opinion, it is fraudulent to perpetrate upon the stockholders of the Missouri Pacific this obvious appropriation of their assets. The cloak of reorganization cannot disguise this appalling abuse of MOP stockholders.

In other words, there is absolutely no excuse to set up a system reorganization of these properties when it is a well known fact that in doing so the Missouri Pacific stockholders must and will be severally penalized.

There is no reason to ask the IGN first mortgage bondholders to give up their prior claim. They should obtain complete satisfaction for the accruals and the principal of their bonds. This first mortgage bond is more than adequately secured and earnings are more than ample to service this debt.

There is no sound reason why any Missouri Pacific security holder should be required to sacrifice his position or his equity in the securities he owns.

When the pending plan was written, the December 31, 1947 balance sheet of the Missouri Pacific alone indicated a surplus deficit of $17,192,835. As of December 31, 1950, this same balance sheet indicated a credit surplus of $17,670,037, and as of September 30, 1951, had reached the sum of $23,138,172. This is obviously a change of some $40,000,000 in a period of three years.

The 1950 surplus addition exceeded $17,000,000. I would like to point out that these figures do not reflect the assets and earnings of the company's important subsidiaries. From December 31, 1947 to December 31, 1950, the investments in road and equipment increased from $616,276,859 to $679,426,620 or $63,148,761. Of this increase, equipment alone accounted for $44,935,932. The cash was $46,308,498 on December 31, 1947, and stood at $61,289,695 as of December 31, 1950. The actual cash on hand as of October 26, 1951 of the Missouri Pacific Railroad alone was $90,815,183.

In this connection, I would like to point out that the trustee has expended for equipment the sum of $58,587,416 during this period and $29,575,036 spent for equipment was financed. I am talking about the Missouri Pacific property now, and talking about it alone.

The trustee actually spent MOP cash for or on account of equipment during this period the sum of $41,513,918 (including equipment obligations retired of $10,552,546).

The total assets of the Missouri Pacific Railroad Company alone and again without reflecting the true value of its investment and its interest in the cash and surpluses of subsidiaries, stood at $695,320,663 as of De-

cember 31, 1947, and $767,396,948 at the end of 1950. Changed conditions? Just an increase of $72,000,000 in this item alone.

Furthermore, the trustee has acquired since December 31, 1947, $820,000 par value of serial 5¼'s, $1,105,000 of central branch first mortgage bonds, and $1,699,000 par value of bonds of the Cairo & Thebes, or a total of $3,629,000 of par value of bonds. Actually, this represented considerably more in claims against the railroad for there was much accumulated interest.

Missouri Pacific assets, as of December 31, 1950, were carried on its books at $767,263,137. However, the consolidated statement of Missouri Pacific with its subsidiaries shows total assets of $1,354,273,553 before intercompany eliminations and total assets of $1,197,128,620 after such elimination.

• • • •

This figure has been substantially increased during 1951. I cite that because I have seen certain exhibits here that have been placed in the record bringing the proportions of earnings and other things up to September 30 I think there can be no doubt about that.

This consolidated statement shows total assets of $1,364,273,553. I just wanted to compare that with the assets which were included or used in formulating this plan, and those assets were $695,320,662, as heretofore quoted on another page ahead of this.

Here is a company with assets of more than $1,200,000,000—good, sound assets—with huge pools of new equipment—with road properties modernized and in excellent shape—with cash resources in excess of $150,000,000—and this plan offers to recapitalize these properties at $512,429,635.

I want to say here I am talking about MOP alone. This capitalization provides approximately 44 million for

the NOT&M, and 56 million for the IGN, or approximately 100 million dollars.

This statement indicates capital and surplus of $294,138,541. If we substitute the new securities to be issued under this plan for those now existing, we will increase this capital and surplus account by $158,000,000, thus bringing the consolidated capital and surplus account of the Missouri Pacific Railroad Company, on a consolidated basis, to a figure in excess of $450,000,000.

For the year 1950, these properties earned, after taxes, available for fixed charges (but after eliminations) $57,116,723. After providing for fixed charges there remained $30,699,077 of earnings. Further deductions of amounts required for special funds brought net earnings down to $29,543,443. Of this latter amount $4,123,955 represented the equity of stockholders of subsidiaries other than the Missouri Pacific.

The remaining total of earnings amounting to $25,419,488 represents the equity of the stockholders of the Missouri Pacific in these earnings, and just to show how ridiculous this whole situation is—the earnings accruing to the common stock of the Missouri Pacific for the year 1950—on the basis of the old capitalization—amounted to more than $26 per share.

Yet, the Commission insists that Missouri Pacific common is worthless. I recall that the common stock of the St. Louis, Southwestern (Cotton Belt) was also considered by the Commission and the same court to be worthless and yet it is now selling around $240, per share.

The increase in mail pay recently granted the railroads amounts to roughly 32 percent plus certain terminal charges. I am sure the railroads themselves do not know exactly how this increase is going to work out as yet, but there is a very substantial increase here. The

Missouri Pacific System received for 1950 the sum of $10,672,099 for carrying mail. Actually, the System reported $14,717,399 but $4,045,300 covered the period of 1947-49.

For the nine months ending September 30, 1951, the system reports income from mail of $7,411,934. Adding an estimate for the fourth quarter of $2,500,000, which I believe is really too conservative, it appears that mail revenue for 1951 for the system will certainly reach $9,911,934.

The increase granted should therefore exceed $3,171,000 which will serve to increase the earnings by that figure. Mr. Peet agreed in his testimony that $2,900,000 would be about right. I think it is important to think of this thing in the light of the service on debt. This money would service 80 million of bonds at four percent.

Inasmuch as the Missouri Pacific has suffered certain flood losses during 1951, the charge to income for which has amounted to $2,237,000 to September 30, it is apparent that this increase comes at an opportune moment. The gross income for the system for 1951 will therefore exceed $13,000,000 of revenue for handling mail.

In 1947 the system received $6,041,828. Here is another change in conditions affecting the income of the Missouri Pacific—an increase of $7,000,000 of income since 1947. And may I point out that there is nothing temporary about this nor will the gross of $13,000,000 mail pay be affected by weather conditions. What I am thinking of is this citrus discussion here. With the steady increase in population and industrial growth in the area served by the Missouri Pacific, gross receipts from mail should continue its upward trend. The actual increase in the mail pay since December 1947, is approximately eighty percent.

Now, about the future earnings of the Missouri Pacific.

Mr. Peet in his testimony here, agreed that under certain assumptions (those now prevailing), as I understood it, the Missouri Pacific System should earn $43,000,000 in 1952. Of course, this does not include the earnings of subsidiaries wholly or partially owned by MOP and not included in the published statements, to which it is entitled.

Is it not about time that we all take a realistic view of the earnings of this railroad. In financial circles, any banker will finance a company on such a ten year record of earnings. However, there are certain people here who want to go back twenty years—to the "dust bowl" days—in order to forecast the future earnings of these properties.

Does anyone doubt that we have a different economy than that existing twenty years ago? Why not approach this problem from where we are today and where we believe we are going Certainly the past is now so distorted by permanent economic changes that we must look to the future. Why should we modernize and dieselize if we are going to return to the "dust bowl" days. Suppose Nebraska ships less wheat—you don't believe that Nebraska is going to stand still, do you? Nebraska will produce and ship other products to compensate for her wheat decline.

The Missouri Pacific Railroad is fortunate that it serves these eleven states where initiative and determination still thrive. This is much more important than a temporary decline in a wheat crop.

In all of the cases the railroads have presented to the Commission requesting higher rates, the Commission has found that the percentage of increased rates finally granted were adequate to cover the higher cost. The

Commission has presumably satisfied this situation by granting increases sufficient to meet the increase in wages and prices. It is only reasonable to assume the Commission will continue to solve this problem.

There is no reason for bondholders or stockholders to be sacrificed. This plan should be recalled at once and if the debtor were permitted to sit down with this Commission, a realistic reorganization of these properties could be worked out quickly. We are no longer in need of Section 77.

The New Orleans, Texas & Mexico Railway is solvent.

The Missouri Pacific Railroad is solvent.

The International-Great Northern R. R. can be reorganized separately.

What we do need and require is a "straight from the shoulder" solution through the application of the Mahaffie Act.

The real assets of the Missouri Pacific, revealed here today for the first time, clearly show that the Missouri Pacific Stock is no more worthless than was the "Cotton Belt" stock when so declared by the Commission in the reorganization plan for that railroad.

FILED
FEB 9 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 528.

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

LEONARD P. MOORE,
CLAIR B. HUGHES,
ALAN S. KULLER,
Attorneys for Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company.

CHADBOURNE, PARKE, WHITESIDE,
WOLFF & BROPHY,
25 Broadway,
New York 4, N. Y.,
Of Counsel.

Dated: New York, N. Y., February 7, 1952.

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Record references in this brief are as follows:

C. R. = Transcript of proceedings in Cause No. 14,256 and Causes Nos. 14,264-14,274 in the Court of Appeals for the 8th Circuit.

1951 R. = The printed record filed in said United States Court of Appeals in Causes Nos. 14,264-14,274.

1946 R. = The record on appeal filed with said Court of Appeals in the appeals numbered 13,367-13,369, both inclusive, and 13,371-13,373, both inclusive.

1941 R. = The record on appeal filed with said Court of Appeals in the appeals numbered 12,130-12,136 inclusive.

D. R. = The Fourth Supplemental Report and Fifth Supplemental Report and Order of the Interstate Commerce Commission approving the plan of reorganization of Missouri Pacific Railroad Company and affiliated debtors.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 528.

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT MANUFACTURERS TRUST COMPANY, AS CORPORATE TRUSTEE UNDER THE FIRST AND REFUNDING MORTGAGE OF MISSOURI PACIFIC RAILROAD COMPANY, IN OPPOSITION.

Opinions Below.

The opinion of the District Court is reported at 93 F. Supp. 832 (E. D. Mo. 1950). The opinion of the Court of Appeals for the Eighth Circuit (C. R. 14-36)* is reported at 191 F. 2d 265 (8th Cir. 1951).

The Fourth and Fifth Supplemental Reports of the Interstate Commerce Commission (D. R. 28469, 28640) are reported at 275 I. C. C. 59, 203. The Plan of Reorganization is at D. R. 28689-760.

* A list of abbreviations and references used in this brief is on page ii, *supra*.

Jurisdiction.

The jurisdictional requisites are set forth in the Petition.

Questions Presented.

1. Whether the District Court performed the duties imposed upon it by Section 77 (e) of the Bankruptcy Act, 11 U. S. C. §205(e), when it approved the Plan of Reorganization for the Missouri Pacific Railroad System certified to it by the Interstate Commerce Commission.

Respondent respectfully refers this Court to its brief in No. 525, *Alleghany Corporation* v. *Group of Institutional Investors, etc.*, for its argument on this question.*

2. Whether the filing of a petition with the District Court pursuant to 11 U. S. C. §208(a) (1) which suspends "all further proceedings for confirmation of the plan" also suspends the proceedings for approval of a plan of reorganization.

Statutes Involved.

The pertinent provisions of 11 U. S. C. §208(a) and Section 77 of the Bankruptcy Act are set forth in the Petition at pp. 3-9.

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* Petitioner has attached as Appendix B to its Petition some of the testimony of its witness, T. C. Davis, at hearings held pursuant to 11 U. S. C. §208(a)(1) before the Interstate Commerce Commission, from November 27 to December 3, 1951. Those hearings were to determine whether any "changes, facts, or developments" have occurred since the approval of the Plan which were not provided for in the Plan and which make it necessary for the Commission to re-examine it. A record of over 1,250 pages was made and more than 150 exhibits were received. Much of this material contradicts the facts and conclusions testified to by Mr. Davis.

Respondent respectfully submits that this Court's action should be based on the evidence in the record before it, which does not include any of the testimony or exhibits received at those hearings before the Commission. While respondent does not believe that any changes have occurred since the approval of the Plan which require its reconsideration by the Commission, it submits that the proper forum for the determination of that question is the Interstate Commerce Commission, and the Commission is now in the process of making that determination.

Statement.

On October 30, 1950, the United States District Court for the Eastern District of Missouri entered its Order No. 3571 approving the Plan of Reorganization for the Missouri Pacific System certified to it by the Interstate Commerce Commission (93 F. Supp. 832).

On July 11, 1951 various parties to these reorganization proceedings filed a petition with the District Court, pursuant to 11 U. S. C. §208(a) requesting that the Interstate Commerce Commission be directed to report to the Court

> "any changes, facts, or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan * * *."

On July 13, 1951, the District Court referred this petition to the Commission which ordered a public hearing for November 27, 1951. These hearings were held from November 27 to December 3, 1951 before a Trial Examiner who will receive briefs on February 12, 1952, and thereafter prepare his report which will be considered by the Commission.

On August 14, 1951, the Court of Appeals for the Eighth Circuit unanimously affirmed the order of the District Court approving the Plan of Reorganization. Two of the appellants in that Court, the State of Texas and James B. Morris *et al.*, filed petitions in this Court on November 7, 1951, for writs of certiorari to review that decision of the Court of Appeals (*State of Texas* v. *Group of Institutional Investors etc.*, No. 416; *James B. Morris, et al. v. Group of Institutional Investors, et al.*, No. 415). Other appellants had obtained orders from this Court extending their time to

file petitions for writs of certiorari to and including January 11, 1952 (Nos. 524-528).

On January 2, 1952 this Court denied certiorari in No. 416, and on January 28 this Court denied certiorari in No. 415.

Argument.

11 U. S. C. §208,* enacted on April 9, 1948, makes it clear that the Interstate Commerce Commission or the District Court may determine whether relevant facts and conditions which affect the fairness or equitability of a reorganization plan have changed since the approval of the Plan by the Commission and before final confirmation of the Plan by the Courts. Its sole purpose was to "correct a situation which has heretofore prevented reconsideration of a reorganization plan years after it first had been promulgated. It does this by placing the duty upon the Commission under prescribed conditions and circumstances, of reporting current facts and conditions surrounding a railroad which might alter or affect provisions of a reorganization plan prepared years before." Sen. Rep. No. 897, 80th Cong., 2d Sess. (1948) 2.**

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* Section 208 is §3 of Public Law No. 478, 80th Cong., 2d Sess. (April 9, 1948), 62 Stat. 162, 167. Sections 1 and 2 of Public Law 478 amend Part I of the Interstate Commerce Act by adding a §20b which establishes a voluntary extrajudicial procedure whereby a railroad carrier may make alterations and modifications in its securities merely by obtaining the approval of the Interstate Commerce Commission and the consent of a specified percentage of the security holders to be affected. See 48 Col. L. Rev. 689, 690 (1938). As originally passed by the House of Representatives, Public Law 478 contained only these two sections. Section 3, now 11 U. S. C. A. §208, was a Senate amendment. See Senate Report No. 897, 80th Cong., 2d Sess. (1948) 7.

** "* * * Commission representatives have testified that under existing section 77 procedures, it has no authority to volunteer advice to the court that relevant facts and conditions which affect the fairness or equitability of a reorganization plan have changed * * * The Committee believes that the law should be clarified and the duty of the Commission made plain."

Upon the filing of a petition under 11 U. S. C. §208(a)(1) "all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court." 11 U. S. C. §208(a)(5). The Senate Report said that this subsection:

> "is also a procedural provision to make certain that petitions alleging new facts or developments must be filed with the court and referred to the Commission. Such action apprises the court of the legal action taken under the new law and suspends further action by the court involving confirmation of the old reorganization plan. The court, of course, retains custody of the property and of the case pending action and report by the Commission." Sen. Rep. No. 897, p. 8.

I.

Section 208 does not suspend this proceeding for approval of the plan.

There is a clear distinction in Section 77 between proceedings for approval of a plan and proceedings for confirmation of a plan. The first paragraph of subsection (e) provides the standards under which "the judge shall approve the plan," while the third paragraph of subsection (e) provides the standards by which "the judge shall confirm the plan." Only "upon confirmation by the judge" are the provisions of the plan "binding upon the debtor, all stockholders thereof . . . and all creditors." And it is only after confirmation that the new corporation has power to carry out the terms of the plan and to issue securities, assume obligations, transfer property, etc. "to the extent contemplated by the plan." Section 77(f).

Petitioners insist that when Congress said that proceedings for confirmation of plan are suspended it just ignored this distinction between approval and confirmation. Yet in the very same Public Law which included 11 U. S. C. §208 Congress demonstrated that it understood this distinction. Section 2 of Public Law 478, 49 U. S. C. §20(b) established a voluntary extrajudicial procedure whereby a railroad could modify its financial structure (see *supra*, p. 4). Subparagraph (13) of Section 2, 49 U. S. C. §20(b)(13), provides that this extrajudicial procedure is available to a railroad in reorganization provided the reorganization court permits its use. The subparagraph then provides:

> "Upon granting of such permission, such [reorganization] proceeding, so far as it relates to a plan of reorganization, shall be suspended."

There is no warrant for ignoring the difference between the broad scope of that language and the limited scope of Section 3 of Public Law 478, 11 U. S. C. §208 (a)(5), that

> ". . . all further proceedings for confirmation of the plan shall be suspended . . ."

Petitioner's appeal to the legislative history of 11 U. S. C. §208 is subject to the same defects discussed by this Court in *Ex Parte Collett*, 337 U. S. 55, 61 (1949). First the "short answer is that there is no need to refer to the legislative history where the statutory language is clear." Second "the legislative history does not support petitioner's position." The Senate Report makes it clear that 11 U. S. C. §208 had the limited and noncontroversial* purpose of giv-

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* See 94 Cong. Rec. 1687 (1948) ("The Committee on Interstate and Foreign Commerce has considered the bill. The Committee has held hearings. We have deleted from the bill every controversial point. No one, to my knowledge, objects to any provision of the bill"). See also 94 Cong. Rec. 1765 (1948).

ing the Commission a chance for a second look at its Plan in the light of developments that had occurred since its approval. The affirmance by the Court of Appeals of the District Court's approval of the Plan has not in the least affected action by the Commission under Section 208(a). The consideration by this Court of the petitions for certiorari to review that affirmance is equally irrelevant to the proceedings by the Commission under that Section.

Conclusion.

There is no reasonable basis in the language or legislative history of 11 U. S. C. §208 for Petitioner's contention that the Court of Appeals or this Court have no power to consider and review the District Court's approval of the Plan while proceedings under Section 208(a) are pending. This Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LEONARD P. MOORE,
CLAIR B. HUGHES,
ALAN S. KULLER,
Attorneys for Manufacturers Trust Company, as Corporate Trustee under the First and Refunding Mortgage of Missouri Pacific Railroad Company.

CHADBOURNE, PARKE, WHITESIDE,
WOLFF & BROPHY,
25 Broadway,
New York 4, N. Y.,
Of Counsel.

Dated: New York, N. Y., February 7, 1952.